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No. 00-711

IN THE

# Supreme Court of the United States

EUGENE RICCIARDI; JACK WAGNER; JAMES FERLO; DAN COHEN; JOHN DESANTIS,

*Petitioners*,

v.

WILLIAM GRANT; IKE HARRIS; AMBASSADOR DEVELOPMENT CORPORATION; LAZER DEVELOPMENT GROUP, INC.; THE ASPEN GROUP,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Are the motives of a public official relevant to the qualified immunity analysis where motive is an element of the alleged constitutional violation, and where a court, in determining whether qualified immunity exists, must first decide whether the plaintiff has alleged the violation of a constitutional right at all.

2. Is the ultimate question of whether a substantive due process violation has actually occurred in this case properly before the Court where there has been no final order on the merits of this issue and where this question can be fully reviewed on appeal from the final judgment.

3. Assuming, contrary to respondents' position, that the answer to Question 2 above is in the affirmative, does a violation of substantive due process occur when public officials, in making a land use decision, act for partisan political and personal reasons totally unrelated to the merits of the land use issue and with the express purpose to deprive a person of their property rights.

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## COUNTERSTATEMENT OF THE FACTS

In 1989 respondent William Grant, a commercial real estate developer from Texas, was asked by a pension advisory group to locate a development opportunity. (47a). In about January 1990, Grant decided on a location on the South Side of Pittsburgh. (47a). The site was a location of a former foundry, which was torn down in 1987 with no community protest. (47a). Remaining on the site were two office buildings which were built in approximately 1900 and had not been occupied since the late 1970s. (47a). At the time respondent undertook this development project, these buildings were dilapidated, uninhabitable and had been condemned by the City of Pittsburgh ("City"). (47a). The buildings were not economically compatible with Grant's project and Grant's prospective buyer, another pension fund, insisted they be torn down. (48a).

On April 4, 1990, Grant signed a Sales Agreement to purchase the property from Brookwood, Inc., the property owner. (48a). Grant and his partner, Ike Harris, engaged in local planning and met with city officials who initially expressed enthusiasm about the project, and encouraged them to proceed. (48a). Grant and Harris received confirmation that the project was permissible under applicable zoning regulations and they filed a subdivision application with the City Planning Commission and received the applicable building permits. (48a-49a).

During the fall of 1990, respondents' proposed demolition plans were revealed to various City officials who indicated that the buildings did not have historic value. (49a). In February 1991 respondents hired a contractor and scheduled simultaneous closings on the sale of the property, the financing, and the purchase of the project for March 15,

1991. At this point, respondents had completed all the necessary preparation and were prepared to move forward on the project, having invested over $400,000. (48a-49a).

Meanwhile, a local interest group, South Side Planning Forum ("SSPF"), had become aware of respondents' development plan and began planning a way to halt the project by nominating the remaining buildings for historic designation pursuant to the City's Historic Structures, Districts, Sites and Objects Ordinance ("the Ordinance"). (49a-50a). On February 12, 1991, the SSPF held a meeting to discuss these plans and was advised by a member of another defendant local interest group, the South Side Local Development Company ("SSLDC"), to act quickly and with secrecy as Grant could legally demolish the buildings prior to their filing of a historic nomination. Once the nomination was filed, the property owner was not permitted to do anything to the building until after the nomination passed through the hearing process and was voted upon by City Council. (50a).

The SSPF nominated the buildings one week before respondents' closing date. In violation of the Ordinance, neither Grant nor the owner/seller were notified prior to the nomination. (50a-51a).

As a result of the nomination, the closings scheduled for March 15 were cancelled (R.763a-74a, Grant pp. 116-117). Although Grant obtained an initial thirty day extension, respondents' lender was unwilling to close on a loan and the buyer was unwilling to close on a contract to purchase a project that could not be built. Nevertheless, respondents continued to oppose the nomination and attempted to secure financing elsewhere. (52a).

The City's Historic Review Commission ("HRC") held a hearing on the matter on April 5 in which it declined to dismiss the nomination even though the SSPF had failed to notify respondents prior to filing the nomination as specifically required by the Ordinance. The HRC did not hold its next meeting until June 7. At that meeting several defendant local development groups expressed support for the historic designation and proposed to develop the property themselves. Some private citizens, however, noted that the buildings were a "dilapidated eyesore" and expressed concern about the loss of jobs for the South Side community if the nomination were to be approved. (52a-53a).

On July 10, in the midst of the nomination process, the Pennsylvania Supreme Court ruled in the case of *United Artists Theatre Circuit, Inc. v. City of Philadelphia*, 595 A.2d 246 (Pa. 1991), *rearg. granted* 8/30/91, *aff'd* on other grounds 635 A.2d 612 (Pa. 1993), that the Philadelphia historic landmark ordinance, similar in material respects to the Pittsburgh historic landmark ordinance, violated the takings clause of the Pennsylvania Constitution by the designation of the buildings as an historic landmark without the consent of the owner. (55a).

Respondents demanded that the nomination be withdrawn in view of *United Artists*. On August 1 and 5, 1991, the City Solicitor sent letters to members of City Council, which included the petitioners, expressing her opinion that:

> [T]he provisions of our ordinance which permits a building . . . to be designated historic without the consent or over the objection of the owner, under current [Pennsylvania] law, would likely result in a

> taking by the City, for which the City must pay damages to the owner. . . . I recommend that you do not . . . designate [the buildings] unless you also conclude that the City should expend moneys to the owners to pay for a taking. Additionally, because case law has held that delays resulting from regulatory and administrative processes also may result in a taking, expeditious resolution of those nominations is advised. (55a-56a).

On July 23 the Planning Commission held its next hearing on the nomination. The owner/seller of the property was invited to the hearing, where he stated he had no objection to the buildings' designation as historic. Proponents of the nomination were obviously attempting to remove the *United Artists* impediment against designating a building without the owner's consent. Nevertheless, they still did not have consent of the equitable owner, Grant. (56a).

The executive director of the SSLDC asserted at the meeting that she was ready to acquire the buildings in redevelopment. She also stated that she was aware that Grant's contract to purchase the property expired on August 7, 1991 and that Grant would no longer be the equitable owner of the property when City Council voted on the nomination on August 12. (56a).

A public meeting before City Council was scheduled for August 5, 1991. On July 30, 1991, respondents became aware of a special "post-agenda" meeting on the designation which included a site inspection. This meeting was scheduled by respondent Councilman Riccardi to be held on August 1. Upon learning of this special meeting, the City

Solicitor issued an opinion letter recommending that such a hearing not take place. Ignoring the advice of their Solicitor, Council held the post-agenda meeting on August 1. (57a).

Present at the post-agenda meeting were several City-Council members, and various representatives of the local development groups. A discussion ensued at the meeting regarding the duration of Grant's interest in the property. It was specifically noted when respondents' interest would expire. It was suggested by certain defendants that if City Council were to delay its vote on the nomination until after the upcoming closing date, then respondents would lose their equitable interest in the property and their ability to obtain financing for the development, regardless of the substantive merits of the nomination. (80a).

Also during this meeting these same defendants admitted that the reason they had filed a zoning protest regarding the property was to delay the respondents' project so as to destroy the respondents' financing and, ultimately, the project itself. (57a-60a). Comments by certain City Council members acknowledged their understanding that a delay would harm respondents' ability to secure financing and indicated that a delay on the nomination would be forthcoming. (57a-60a, 80a).

On August 2 the HRC again voted to make no recommendation to City Council regarding the merits of the nomination. Within a few days of this meeting, Grant obtained from Brookwood another extension of the closing date until August 21, 1991. (60a).

On August 5 City Council held a public hearing on the nomination. Contrary to prior promises to respondents that

the vote on the nomination would take place by August 12, and contrary to advice from their own solicitor, City Council decided to delay their vote on the nomination until September. (60a). Thus, on August 21, the owner/seller of the property declared the sales agreement for the property to be terminated. Respondents equitable property interest was thereby destroyed and their investment of over $400,000 was lost.

The district court found that the record in this case contains evidence from which a finder-of-fact could conclude that but for the impediments created by the historic designation nomination and the length of time for which it remained pending, Grant would have been able to obtain financing to continue with the project. In addition, there is sufficient evidence to find that if the historic nomination had not arisen, Grant's original buyer would have purchased the property upon its completion. (62a). Finally the district court had also concluded that there was considerable evidence that the actions of the City, City Council, and City Council members were deliberately designed to destroy respondents' property interest for partisan political and other arbitrary reasons totally unrelated to the merits of the nomination. (District Court Opinion 9/28/95, p. 42).

The district court reviewed the record with regard to petitioners Riccardi, Wagner, Ferlo and Cohen, who at all relevant times were members of City Council, and noted that they all attended the August 1 "post-agenda" meeting and each had knowledge of the condition of the buildings. The court held that "a finder of fact could conclude from the information available at this time that a reasonable official would recognize that the buildings lacked meaningful his-

toric significance." (81a). Furthermore, the district court found that each of these petitioners acquiesced in the decision to delay the final vote on the nomination. Each acquiesced in a letter threatening the HRC for a recommendation, which a fact-finder could conclude was an attempt to coerce record support for a nomination which lacked merit. The district court found that respondents had met their burden of demonstrating that the nomination and resulting delay was purposely motivated by partisan political and personal reasons unrelated to land-use planning and designed to cause injury to respondents. (81a-82a).

Finally, the court found that the record supported a finding that petitioner DeSantis' conduct was actionable. Specifically, DeSantis' actions surrounding the HRC's decision to recommend historic designation constituted conduct which "a reasonable official should have known was in furtherance of a scheme to administer the ordinance for purposes unrelated to land use planning." (93a). The court also found that a reasonable official would have recognized that the buildings lacked historic value. Finally a reasonable official would have realized from the length of time and facts surrounding the nomination that certain members of City Council were attempting to delay a final vote on the merits in order to derail an out-of-state developer's project and to prevent the incumbent mayor from getting the corresponding political credit. (93a-94a).

Petitioners appealed the district court's decision to the United States Court of Appeals for the Third Circuit. On appeal, the petitioners alleged that the district court had erred in consid-

ering the petitioners' intent or motives when determining qualified immunity. Petitioners also asserted that the right to substantive due process asserted by respondents was not clearly established at the time of the alleged violation. Finally, petitioners asserted that the district court erred in denying their request for absolute legislative immunity. The Third Circuit, in a memorandum opinion and order, rejected all three of petitioners' arguments and affirmed the district court.

## ARGUMENT

### I. WHEN RESOLVING THE QUALIFIED IMMUNITY DEFENSE, THE CIRCUIT COURTS HAVE CONSISTENTLY AND CORRECTLY APPLIED EVIDENCE OF A PUBLIC OFFICIAL'S MOTIVES IN CASES INVOLVING AN INTENT-BASED CONSTITUTIONAL VIOLATION.

#### A. The Qualified Immunity Test

The doctrine of qualified immunity provides a safeguard against undue interference with government functions by providing public officials some protection from disabling threats of liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). On the other hand, an action for damages may be the only means available for vindication of constitutional guarantees. Therefore, the determination of the scope of immunity inherently requires a balance between the evils inevitable in any alternative. *Id.* at 813-814; citing *Butz v. Economou*, 438 U.S. 478, 506 (1978).

In *Harlow*, the Court re-examined the test used to determine whether or not qualified immunity had been estab-

lished.[1] Under the previous case law, the qualified immunity defense had both an objective and subjective aspect. See *Wood v. Strickland*, 420 U.S. 308, 322 (1975). Due to the societal costs involved in the litigation of the subjective good faith of government officials, the Court announced a new test which provides immunity to government officials where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818.

Since *Harlow*, the Court has also explained that when determining whether qualified immunity exists, it is first necessary to ask "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilly*, 500 U.S. 226, 232, (1991). Only after a court makes this threshold determination does it consider whether this right was "clearly established," the second step in the qualified immunity analysis. *Id.*

For example, in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court was faced with determining whether police officers were entitled to qualified immunity when they permitted media observers to watch them execute an arrest warrant in the suspect's home. Before reaching the objective inquiry of whether the officers acted reasonably in light of clearly established law, the Court first analyzed the constitutional question of whether or not there was a violation of the Fourth Amendment. *Id.* at 609-614.

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[1] Qualified or good faith immunity is an affirmative defense that must be pled and proven by the defendant official. *Gomez v. Toledo*, 446 U.S. 635 (1980).

Only after determining that there was a constitutional violation did the Court engage in the objective inquiry of whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful in light of clearly established law and the information the officers possessed. *Id.* at 614-615.

The Circuit Courts have consistently applied the same framework when determining qualified immunity. In some cases the alleged constitutional violation is based upon the public official's intent. In such circumstances it is necessary for the court to consider the public official's intentions in order to decide whether or not there has been a constitutional violation. Only if the court has found that a violation has occurred does it then engage the objective reasonableness standard announced in *Harlow*.

Petitioners attempt to create an issue where there is none by expanding the objective test used in the second step of the qualified immunity analysis to include the first step, or threshold determination, of whether a constitutional violation has occurred. No court, however, has taken this approach. To the contrary, this Court declined such a theory in *Crawford-El v. Britton*, 523 U.S. 574 (1998). In addition, Circuit Courts have generally followed the framework utilized by this Court when determining qualified immunity in cases involving intent-based constitutional violations.

### B. *Crawford-El v. Britton*

Petitioners argue that this Court's decision in *Crawford-El v. Britton* is inconsistent and contains contradictory language regarding the relevancy of subject motives to the qualified

immunity defense. The alleged contradictions, however, stem from petitioners' own confusion of the two different steps of the qualified immunity analysis. Essentially, petitioners attempt to convert the factual issue of motivation into the legal question of objective reasonableness. This is exactly the approach which was rejected in *Crawford-El*, 523 U.S. at 593-93 (The policy concerns underlying *Harlow* do not support the unprecedented proposal "to immunize all officials whose conduct is 'objectively valid' regardless of improper intent.")

Although the direct holding in *Crawford-El* was limited to the plaintiff's burden of proof, the Court also addressed the issue of subjective intent in relation to the qualified immunity defense. In *Crawford-El*, the Court rejected the District of Columbia Circuit's requirement that a plaintiff offer clear and convincing evidence of improper motive in response to a motion for summary judgment based on qualified immunity, where unconstitutional intent is an element of the plaintiff's affirmative case. 523 U.S. at 592-594. In doing so, the Court clarified that the purely factual question of improper intent is separate from the "essentially legal" question of whether an official's conduct violated clearly established law. *Id.* at 589.

Petitioners argue that the Court failed to address one of the questions presented in *Crawford-El*: Is an official entitled to qualified immunity if he asserts a legitimate justification for his allegedly improper act and that justification would have been a reasonable basis for the act even if evidence shows that the official's actual reason for the act was unconstitutional? The Court, however, has implicitly answered this question by rejecting the dissents' alternative constructions.

See, e.g., *Hoard v. Sizemore*, 198 F.3d 205, 219 (6th Cir. 1999).

In *Crawford-El*, the Court declined a suggestion which would require the plaintiff to prove that the official's proffered reason for his actions is pretextual. It also rejected an approach that would grant immunity if the trial court found that the asserted grounds for the official's actions were objectively valid. Moreover, the Court noted that summary judgment serves to weed out insubstantial lawsuits prior to trial. In responding to a motion for summary judgment, the plaintiff must "identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." 523 U.S. at 600, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

The Court also distinguished the standards for determining qualified immunity and the ultimate burden of proof on the plaintiff in asserting a cause of action:

> Our holding [in *Harlow*] that bare allegations of malice cannot overcome the qualified immunity defense, did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. . . . It is clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated.

*Crawford-El*, 523 U.S. at 588.

The determination of whether a plaintiff asserted a constitutional violation at all is a necessary concomitant to the threshold immunity question. *Id.* at 589, n.11, citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Thus, the disposition in *Harlow* does not delete the state of mind inquiry from every

constitutional calculus. *Id.* Rather, the Court drew a distinction between the bare allegations of malice that would have provided a basis for rebutting a qualified immunity defense under *Wood v. Strickland*, and the allegations of intent that are essential elements of certain constitutional claims.

In summary, the Court affirmed the following principles regarding the qualified immunity defense. The determination of whether the plaintiff has alleged the violation of a constitutional right at all is a necessary step in deciding qualified immunity. *Siegert*, 500 U.S. at 232. In cases involving intent-based constitutional violations, evidence that a public official's conduct was improperly motivated is an essential element of a plaintiff's affirmative case in chief. *Crawford-El*, 528 U.S. at 589. This factual issue is distinct from the separate qualified immunity question of whether the official's alleged conduct violated "clearly established law." *Id.* With respect to the second question, *Harlow* dictates that an inquiry is not made into whether the official actually knows that he or she is violating clearly established law. Rather, an objective test is used. Finally, the Supreme Court has rejected any heightened burden on the plaintiff in proving the essential elements of the alleged constitutional violation, despite the fact that the defendant has raised a qualified immunity defense. *Id.* at 594-95.

### C. The Third Circuit's Analysis

The Third Circuit has addressed petitioners' argument on two occasions, once before this Court's decision in *Crawford-El*, and once after. In *Grant v. City of Pittsburgh*, 98 F.3d 116 (3rd Cir. 1996) ("*Grant I*"), the Third Circuit first addressed the issue of whether a court, in applying *Harlow*'s

objective test, may consider evidence of a defendant's state of mind when motivation is an essential element of a civil rights claim. In an opinion that foreshadowed the reasoning of the Supreme Court in *Crawford-El*, the Third Circuit held that it can.

Specifically, the Third Circuit recognized the difference between the threshold inquiry (a factual issue) of whether the plaintiff has alleged a constitutional violation and the question of whether an official's conduct violated clearly established law (an essentially legal issue):

> It is now widely understood that a public official who knows he or she is violating the constitution nevertheless will be shielded by qualified immunity if a "reasonable public official" would not have known that his or her actions violated clearly established law.
>
> The subjective inquiry that *Harlow* proscribes, however, is distinct from the question of whether a public official, in taking official action that but for an improper motive, would not be legally proscribed, in fact harbored the improper motive. For purposes of clarity, when we use the terms "state of mind" and "motivation," we are referring to the state of mind element of the underlying offense, rather than to the question whether the public officials knew they were violating clearly established rights.

*Grant I*, 98 F.3d at 123-24.

With regard to the specific facts of this case, the court held that the alleged substantive due process violation "is pre-

cisely the sort of claim where clearly established law makes the conduct legal or illegal depending on the intent with which it is performed." *Id.* at 125. The court explained that the substantive due process claims involved in this case involve the use of otherwise legitimate government machinery to attain an illegitimate end. *Id.*

The court correctly held that in this case qualified immunity is not defeated because the officials "in fact knew" that they were violating the Constitution. (This is the subjective inquiry forbidden by *Harlow*). Instead, qualified immunity is overcome in this case because "reasonably competent public officials" who act with certain improper motives "should know the law proscribes their conduct." *Id.* at 125, citing *Harlow*, 457 U.S. at 819.

Following its decision in *Grant I*, the Third Circuit remanded the case to the district court and instructed the lower court to analyze with specificity the conduct of each public official defendant with regard to plaintiff's constitutional claims. The Third Circuit also instructed the district court to reevaluate the defendants' qualified immunity claims without regard to whether they "knowingly violated" the plaintiff's constitutional rights. *Id.* at 124, n.3. On remand, the district court presented its factual determination of the public officials' conduct and denied petitioners' request for summary judgment based on qualified immunity. Petitioners appealed, arguing that *Crawford-El v. Britton*, which had been announced subsequent to *Grant I*, precluded any evidence of a defendant's subjective motive when the defendant raises the defense of qualified immunity.

In its memorandum opinion on appeal after remand, *Grant v. City of Pittsburgh*, No. 99-3496 (3rd Cir. June 29, 2000), ("*Grant II*"), the Third Circuit flatly rejected this assertion, holding that *Crawford-El* actually affirmed its conclusion in *Grant I*. (7a-8a), citing *Crawford-El*, 523 U.S. at 588-89.

In light of *Crawford-El*, the Third Circuit correctly affirmed the decision of the district court in this case. Because unlawful intent is an essential element of the alleged civil rights violation in this case, and because the existence of a constitutional violation is a necessary concomitant to the qualified immunity analysis, the court was not restricted by *Harlow* from considering evidence of the petitioners' intent or motive in this case. Once this factual issue is resolved, the next step is to determine whether or not "reasonably competent public officials" who act with certain improper motives "should know the law proscribes their conduct." *Harlow*, 457 U.S. at 819.

### D. Other Circuit Court Cases

Petitioners assert that there is a conflict among the Circuit courts regarding the application of the qualified immunity defense in cases involving motive-based constitutional violations. In support of this contention petitioners cite to a few circuit courts, which they assert have varied views on this subject. While the three circuits cited by petitioners may use a different analytical framework for deciding qualified immunity, they all recognize that evidence of intent is relevant in cases involving motive-based constitutional violations. Moreover, petitioners fail to cite to several other circuit courts which have resolved this issue similar to the Third Circuit.

The First Circuit has recognized that a public official's intent is relevant in determining the threshold question of whether there is a constitutional violation. In *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), the defendants asserted that the district court erred in considering their allegedly discriminatory motive and argued that they acted with objective reasonableness. The court stated that motivation or intent is an element of the cause of action for a subset of constitutional torts. *Id.* at 11.

In *Acevedo-Garcia*, the plaintiffs alleged that they were terminated because of their political affiliation. The court noted that this constitutional claim has no meaning absent the allegation of impermissible motivation. The court ultimately held that it lacked jurisdiction to consider the denial of qualified immunity. Specifically, the court stated that it "lacked the power to inquire into the fact-based question of what the evidence does (or does not) show concerning whether the [public official's] actions violated the asserted right – a question that depends, in this case, on the [public official's] motives . . . ." *Id.* at 12, quoting *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995).

The Second Circuit has also recognized that evidence of a public official's intent or motive is relevant in deciding the threshold constitutional question. In *Sound Aircraft Services, Inc. v. Town of East Hampton*, 192 F.3d 329 (2nd Cir. 1999), the defendants raised the defense of qualified immunity to the plaintiff's section 1983 Equal Protection claim. Although the court held that the district court erred in denying qualified immunity on the basis that there were issues of fact with respect to the defendant's motivations, the court also outlined

what evidence the district court should consider on remand. *Id.* at 334.

The Second Circuit held that the district court may first determine whether the plaintiff has alleged a constitutional violation at all. *Id.* at 334, citing *Wilson*, 526 U.S. 603. The court then proceeded to analyze the plaintiff's Equal Protection claim and, in doing so, discussed evidence of the defendants' intent or motivation. The court noted that "when intent is an element of a constitutional violation the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff." *Id.* at 335, quoting *Crawford-El v. Britton*, 523 U.S. 574 (1998).

In *Dudley v. Angel*, 209 F.3d 460, 463 (5th Cir. 2000), the Fifth Circuit held that the defendants were entitled to qualified immunity because the plaintiff was unable to satisfy the first prong of the two-part test for overcoming qualified immunity – the violation of a constitutional right. *Id.* at 463. In *Dudley*, the plaintiff alleged he was discriminated against on the basis of his political affiliation. The Fifth Circuit recognized that an element of such a claim is the charge that the defendant's conduct was improperly motivated. The court stated that "[i]n a First Amendment violation case, such as this, where wrongful motive is an element of the violation, the district court must not let the objectively reasonable test of the second step overcome the requirements of the first step." *Id.* at 463.

In *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999), the Sixth Circuit addressed the relevancy of the defendant's intent in determining qualified immunity. The court refused to

extend the legal question of objective reasonableness to apply to the factual issue of motivation underlying an alleged constitutional violation. The court stated:

> It appears to us that defendant's argument is an attempt to transform the factual issue of motivation into the legal question of objective reasonableness. **Such an approach would immunize all defendants in cases involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds.**

198 F.3d at 218, citing *Crawford-El*, 523 U.S. 574 (emphasis added).

The Seventh Circuit has developed a two-step test for determining qualified immunity in cases involving intent or motive-based constitutional violations. In such cases, the Seventh Circuit has held :

> *Harlow* calls for the district court to conduct a two-part analysis when state of mind is at issue: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." Thus, when intent is crucial to a party's claim, as it is in this case, the court's consideration of intent is relevant to the determination of whether a constitutional violation exists but not in deciding if the constitutional standard was clearly established.

*Auriemma v. Rice*, 910 F.2d 1449, 1453 (7th Cir. 1990) (en banc), *cert. den.* 501 U.S. 1204 (1991), quoting *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986).

The Ninth Circuit and the Tenth Circuit have also held that evidence of intent is relevant to the qualified immunity analysis when motive is an essential element of the plaintiff's alleged constitutional violation. See e.g. *Lindsey v. Shalmy*, 29 F.3d 1382, 1384-85 (9th Cir. 1994); *Pueblo Neighborhood Heath Centers, Inc. v. Losavio*, 847 F.2d 642, 647-48 (10th Cir. 1988).

Finally, the Eleventh Circuit, recognizing that intent is relevant in cases involving intent or motive-based constitutional violations, has developed its own approach in such situations. In *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996), the court acknowledged that sometimes objectively reasonable actions can be taken both for lawful and unlawful intent. When determining "mixed-motive" cases, the Eleventh Circuit takes into account the subjective intent and the principles which justify qualified immunity. *Id.* at 1535, n. 8. Accordingly, the Eleventh Circuit has held that where the facts assumed for purposes of summary judgment involving qualified immunity show mixed-motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity. *Id.* at 1535; *Stanley v. City of Dalton*, 219 F.3d 1280, 1295-96 (11th Cir. 2000).

As illustrated by the above-cited cases, circuit courts have held, that courts are not barred from considering evidence of a defendant's state of mind in determining whether a plaintiff has produced sufficient evidence to withstand a motion for

summary judgment on the issue of qualified immunity where the defendant's state of mind is an essential element of the alleged constitutional violation itself. This approach has also been affirmed by this Court in *Crawford-El v. Britton*, 523 U.S. 574. Therefore, a further review by this Court is not necessary.

## II. THE ISSUE OF WHETHER A SUBSTANTIVE DUE PROCESS VIOLATION HAS OCCURRED IS NOT PROPERLY BEFORE THIS COURT.

Federal courts of appeals ordinarily have jurisdiction over appeals from "final decisions of the district courts." *Cunningham v. Hamilton County*, 527 U.S. 198, 200 (1999), citing 28 U.S.C. § 1291. The Supreme Court has held that a decision is not final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 204, citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-522 (1988). Nevertheless, the Supreme Court has interpreted the term "final decision" in § 1291 to permit jurisdiction over appeals from a small category of orders that do not terminate the litigation. *Cunningham*, 527 U.S. at 204. Known as the collateral order doctrine, the orders which fall within this category must be (1) conclusive, (2) resolve important questions separate from the merits, and (3) effectively unreviewable on appeal from the final judgment in the underlying action. *Id.*

Petitioners' second question presented and second argument for granting certiorari fails to meet the second and third elements of the collateral order doctrine. First, this issue, as framed by petitioners, involves the ultimate question of whether or not a substantive due process has occurred in this

case. As presented, this question is distinct from the issue of qualified immunity. Rather, this issue goes to the heart of respondents' ultimate claim, the merits of which has not yet been decided by either the district court or the Third Circuit.

To the contrary, the district court merely denied petitioners' motion for summary judgment. It did not find that a violation of substantive due process had, in fact, occurred. Nor has the Third Circuit yet addressed this issue directly. Both of petitioners' prior appeals involved their immunity claims and did not challenge whether a substantive due process violation had occurred. Petitioners were indeed correct not to appeal this issue because there has been no final order from the district court with regard to the merits of the respondents' substantive due process claim. Therefore, this issue does not meet the second requirement of the collateral order doctrine and is, therefore, not appealable at this time.

Nor will this issue be unreviewable after a final judgment. Should the respondents prevail in a trial on this case after remand, petitioners would then be able to appeal the final judgment and challenge the standard used by the court for determining whether or not a substantive due process violation has occurred. Therefore, this question also fails to meet the third element of the collateral order doctrine and the Court of Appeals would have lacked jurisdiction to hear this argument.

Finally, the petitioners' second argument related to qualified immunity. Although the question of whether a constitutional right was "clearly established" is an element of the qualified immunity analysis, petitioners are not currently arguing this issue. Petitioners do not engage in the test for de-

termining whether the right was clearly established as the term was defined in this Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987). Instead, petitioners argue that the Third Circuit's definition of that right is incorrect. This alleged error, however, is not a final appealable order and cannot be appealed at this time pursuant to the collateral order rule. As a result, the presentation of this issue to the Supreme Court is premature and this Court should deny petitioners' writ of certiorari on such grounds.

## III. A SUBSTANTIVE DUE PROCESS VIOLATION DOES OCCUR WHEN RESPONDENTS ARE DEPRIVED OF A PROPERTY INTEREST BECAUSE OF ARBITRARY AND CAPRICIOUS GOVERNMENT CONDUCT.

### A. Third Circuit Cases

Notwithstanding that this issue is not properly before this Court, the district court was correct in determining that respondents have presented sufficient facts to establish a violation of substantive due process. In addition, the Third Circuit cases relied upon by the district court correctly define the scope of the substantive due process protections.

In deciding that respondents had stated a claim for a violation of substantive due process, the district court relied upon several Third Circuit decisions including *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988), *cert. denied*, 488 U.S. 851 & 868 (1988). In *Bello*, the court addressed whether a person's constitutional right to due process is violated when public officials process a building permit application pursuant to a constitutionally adequate procedure, but deliberately and arbitrarily abuse government power to deny

the application. 840 F.2d at 1126. The court determined that the plaintiff had presented evidence from which a jury could conclude that certain public officials, acting in their official capacities, improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. *Id.* at 1129. The court held that:

> These actions can have no relationship to any legitimate government objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

*Id.* at 1129-30.

The Third Circuit repeatedly affirmed this principle in subsequent cases dealing with land use decisions which were motivated by bias, bad faith, or improper motive, such as partisan or personal reasons unrelated to the merits of the matter before the governmental body. See: *Midnight Sessions, Ltd v. City of Philadelphia*, 945 F.2d 667, 683 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3rd Cir. 1993); *DeBlasio v. Zoning Board of Adjustment to Township of West Amwell*, 53 F.3d 592 (3rd Cir. 1995), *cert. denied*, 516 U.S. 937 (1995); *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253 (3rd Cir. 1995), *cert. denied*, 516 U.S. 915 (1995); *Independent Enters., Inc. v. Pittsburgh Water & Sewage Authority*, 103 F.3d 1165 (3rd Cir. 1997); *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3rd Cir. 2000).

### B. Cases Cited By Petitioners Are Distinguishable

Petitioners' argument seizes upon the apparently conflicting policies underlying a substantive due process claim involving a land use decision. On one hand, federal courts are reluctant to sit as appeal boards for disputes between developers and local land use planning agencies. On the other hand, developers have a due process right to be free from "arbitrary and irrational" government actions. *Woodwind Estates*, 205 F.3d at 122.

Petitioners assert that the Third Circuit's application of substantive due process protections in the area of land use decisions has been too broad. In support of this contention, petitioners assert that a better view is that followed by the First Circuit in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982). The alleged due process violation at issue in *Creative Environments*, however, makes this case distinguishable from the Third Circuit cases cited above and from the instant case.

In *Creative Environments*, the plaintiff alleged that the town frustrated plaintiff's development plans by "distorting" state law. 680 F.2d at 829. The court held that the plaintiff failed to establish a constitutional violation because the claim that state officials exceeded the scope of their authorization presented a common state law dispute between a property owner and a local zoning body and, therefore, failed to rise to the level of arbitrary and capricious conduct necessary to support a substantive due process violation. *Id.* at 833.

Petitioners argue that the First Circuit's decision in *Creative Environments* is at odds with Third Circuit precedent. To the contrary, *Creative Environments* has been cited with approval by the Third Circuit. See: *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir. 1987), *cert. denied*, 482 U.S. 906, *rehearing denied*, 483 U.S. 1040 (1987); *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582 (3rd Cir. 1998).

*Sameric* also involved an alleged substantive due process violation in the context of a historical designation process. The plaintiff's claims in *Sameric*, however, were based upon the officials' alleged *ultra vires* considerations. The plaintiff did not claim that the city officials acted for reasons unrelated to land use planning. 142 F.3d at 595. Instead, the Third Circuit found that the plaintiff's claims were in the nature of an average dispute between a land owner and local zoning officials. In doing so, the court noted that Sameric's allegations were very similar to those that the First Circuit found to be insufficient to form the basis of a constitutional violation in *Creative Environments*. 142 F.3d at 596.

The Third Circuit was quick to point out, however, that *Sameric* was distinct from cases involving an official's conduct which is improperly motivated by reasons that are unrelated to the merits of the land use decision, such as in the instant case:

> [A]t the outset we note that Sameric has not established, or for that matter even alleged, that the Historical Commission's decision to designate the building was motivated by personal gain, invidious discriminatory intent, or partisan political consid-

> erations, the presence of which we have found establish substantive due process claims based on improper motive. . . . [See] *Grant v. City of Pittsburgh*, 98 F.3d 116, 119 (3rd Cir. 1996) (alleging that the defendants were motivated by partisan politics in designating an area as historic as they intended to thwart plaintiff's development project so that the mayor would not receive credit for the resulting economic benefits).

*Sameric*, 142 F.3d at 594, (other citations omitted).

It is important to recognize that in this case the respondents have asserted and have produced evidence which will support a finding that the historic nomination of the MacHemp buildings and the procedures utilized in conjunction with the nomination were not considered and exercised by the petitioners on the merits of the historic designation, but instead were used to further partisan political or personal purposes which were totally unrelated to the purpose of the historic designation process.

Unlike *Sameric* and *Creative Environments*, the present case does not fall into the category of the garden-variety land dispute Rather, this case involves governmental action which was arbitrary, irrational, and tainted by improper motive. This violated the well-established doctrine that a property owner has a right to a neutral arbitrator of his or her property rights. *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). The Third Circuit is correct in holding that such conduct is a proper basis to support a finding of a substantive due process violation.

### C. Other Circuit Courts

Finally, many other circuit courts have recognized that government action in land use cases which is unrelated to the merits of the land use issue may be arbitrary or irrational and, therefore, violates the property owner's right to substantive due process.

The Second Circuit has held that in land use cases the principles of substantive due process protect property owners of the right to be free from arbitrary or irrational actions. *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2nd Cir. 1988). *Brady* involved a zoning decision which was allegedly based on impermissible political animus. Although the court was mindful of the proposition that federal courts should not become zoning appeal boards to review every incorrect zoning decision, the court stated that "when a landowner's constitutional rights are infringed by local zoning actions, [the court's] duty to protect the constitution is clear." *Id.* at 215, quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2nd Cir. 1986).

The Fourth Circuit is substantially in agreement with the Third Circuit. In addressing this issue, the Fourth Circuit held:

> The dispositive question is whether local officials have singled out a permit application for adverse treatment due to "illegitimate political or, at least, personal motives." Such "purposeful discrimination" against a particular individual violates the Constitution even where no recognized class-based or invidious discrimination was involved.

*Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989), quoting *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983).

The Sixth Circuit employs a test whereby great deference is given to the local authority's professional judgment. The court will uphold the local official's decision unless it is a substantial departure from the accepted norms as to demonstrate that the decision maker did not actually exercise professional judgment. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992). In other words:

> The administrative decision will withstand substantive due process attack unless it "is not supported on any rational basis" or is "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case."

*Id.* at 1221, citing *Greenhill v. Bailey*, 519 F.2d 5, 10 n.12 (8th Cir. 1975).

The Ninth and Eleventh Circuits have held that land use decisions may be held to violate substantive due process if they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir.1989), citing, *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988). The Eleventh Circuit has also noted that a deprivation of a property interest is of constitutional stature if it is undertaken "for an improper motive and by means that were

pretextual, arbitrary and capricious, and ... without any rational basis." *Greenbriar*, 881 F.2d at 1577.

These cases demonstrate that the Third Circuit is not alone in considering a due process violation in circumstances where government officials act for partisan political or personal reasons which are unrelated to the merits of the land use issue before them. When such conduct is not related to any legitimate government interest and deprives a party of a property right, it violates that party's right to substantive due process. *Bello*, 840 F.2d at 1129-30

## CONCLUSION

For the reasons stated above, respondents respectfully request this Honorable Court deny the petition for writ of certiorari.

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